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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10

11 **ANTHONY LEWIS**
12 #96337

13 vs.

14 A. STANKUS, *et al.*,

15 Defendants.

3:10-cv-00497-ECR-VPC

16
17 **ORDER**

18 This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff's
19 application to proceed *in forma pauperis* is granted (docket #12). Plaintiff also filed a motion for
20 appointment of counsel (docket #6).

21 **I. Plaintiff's Motion for Appointment of Counsel**

22 Plaintiff has filed a motion seeking the appointment of counsel in this case (docket #6).
23 A litigant in a civil rights action does not have a Sixth Amendment right to appointed counsel. *Storseth*
24 *v. Spellman*, 654 F.2d 1349, 13253 (9th Cir. 1981). In very limited circumstances, federal courts are
25 empowered to request an attorney to represent an indigent civil litigant. The circumstances in which a
26 court will make such a request, however, are exceedingly rare, and the court will make the request under
only extraordinary circumstances. *United States v. 30.64 Acres of Land*, 795 F.2d 796, 799-800 (9th Cir.

1 1986); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986).

2 A finding of such exceptional circumstances requires that the court evaluate both the
 3 likelihood of success on the merits and the plaintiff's ability to articulate his claims in *pro se* in light of
 4 the complexity of the legal issues involved. Neither factor is dispositive, and both must be viewed
 5 together in making a finding. *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991)(citing *Wilborn*,
 6 *supra*, 789 F.2d at 1331). The district court has considerable discretion in making these findings.
 7 Plaintiff has demonstrated his ability to articulate his claims, which do not appear to involve complex
 8 legal issues. The court will not enter an order directing the appointment of counsel; plaintiff's motion
 9 is denied.

10 The court now reviews the complaint (docket #1-1).

11 **II. Screening Standard**

12 Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a
 13 prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious,"
 14 "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who
 15 is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an
 16 arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may,
 17 therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or
 18 where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a
 19 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*
 20 *v. Arizona*, 885 F.2d 639, 640 (9th Cir. 1989).

21 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 22 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under
 23 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under
 24 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*,
 25 232 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a "formulaic recitation of the
 26 elements of a cause of action;" it must contain factual allegations sufficient to "raise a right to relief

1 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965
 2 (2007). "The pleading must contain something more...than...a statement of facts that merely creates a
 3 suspicion [of] a legally cognizable right of action." *Id.* In reviewing a complaint under this standard,
 4 the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex*
 5 *Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to
 6 plaintiff and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).
 7 Allegations in a *pro se* complaint are held to less stringent standards than formal pleadings drafted by
 8 lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per*
 9 *curiam*); *see also Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). All or part of
 10 a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the prisoner's claims lack an
 11 arguable basis either in law or in fact. This includes claims based on legal conclusions that are untenable
 12 (*e.g.* claims against defendants who are immune from suit or claims of infringement of a legal interest
 13 which clearly does not exist), as well as claims based on fanciful factual allegations (*e.g.* fantastic or
 14 delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever v. Block*, 932 F.2d 795, 798
 15 (9th Cir. 1991).

16 To sustain an action under section 1983, a plaintiff must show (1) that the conduct
 17 complained of was committed by a person acting under color of state law; and (2) that the conduct
 18 deprived the plaintiff of a federal constitutional or statutory right." *Hydrick v. Hunter*, 466 F.3d 676,
 19 689 (9th Cir. 2006).

20 **III. Instant Complaint**

21 Plaintiff, who is incarcerated at Lovelock Correctional Center ("LCC"), has sued
 22 Northern Nevada Correctional Center ("NNCC") corrections officers Lt. A. Stankus, P. Lessard, and A.
 23 Luis. Plaintiff alleges the following: on June 18, 2010, Lessard delivered a breakfast tray to plaintiff's
 24 cell. Plaintiff then told Luis that the sugar packet for his coffee was empty. Luis took the packet and
 25 threw it on the floor. Stankus approached and plaintiff told him what happened. Luis then kicked the
 26 food slot closed on plaintiff's left hand, Luis and Stankus "rushed the food slot," squeezing it closed on

1 plaintiff's hand, Stankus beat plaintiff's hand with his flashlight, then Lessard grabbed plaintiff's
 2 swollen fingers and bent them backwards, trying to break them. When plaintiff was seen by medical,
 3 they took photographs and x-rays of his hand and administered a shot. Plaintiff claims that defendants
 4 used excessive force in violation of his Eighth Amendment rights and transferred him to LCC in
 5 retaliation for filing this lawsuit in violation of his First Amendment rights.

6 The Eighth Amendment prohibits the imposition of cruel and unusual punishments and
 7 "embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency." *Estelle*
 8 *v. Gamble*, 429 U.S. 97, 102 (1976). "[W]henever prison officials stand accused of using excessive
 9 physical force in violation of the [Eighth Amendment], the core judicial inquiry is . . . whether force was
 10 applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause
 11 harm." *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); *see also Whitley v. Albers*, 475 U.S. 312, 320-21
 12 (1986); *Watts v. McKinney*, 394 F.3d 710, 711 (9th Cir. 2005); *Martinez v. Stanford*, 323 F.3d 1178, 1184
 13 (9th Cir. 2003); *Marquez v. Gutierrez*, 322 F.3d 689, 691-92 (9th Cir. 2003); *Clement v. Gomez*, 298 F.3d
 14 898, 903 (9th Cir. 2002); *Jeffers v. Gomez*, 267 F.3d 895, 900 (9th Cir. 2001) (*per curiam*); *Schwenk v.*
 15 *Hartford*, 204 F.3d 1187, 1196 (9th Cir. 2000); *Robins v. Meecham*, 60 F.3d 1436, 1441 (9th Cir. 1995);
 16 *Berg v. Kincheloe*, 794 F.2d 457, 460 (9th Cir. 1986). When determining whether the force is excessive,
 17 the court should look to the "extent of injury . . . , the need for application of force, the relationship
 18 between that need and the amount of force used, the threat 'reasonably perceived by the responsible
 19 officials,' and 'any efforts made to temper the severity of a forceful response.'" *Hudson*, 503 U.S. at 7
 20 (quoting *Whitley*, 475 U.S. at 321); *see also Martinez*, 323 F.3d at 1184. Although the Supreme Court
 21 has never required a showing that an emergency situation existed, "the absence of an emergency may
 22 be probative of whether the force was indeed inflicted maliciously or sadistically." *Jordan*, 986 F.2d
 23 at 1528 n.7; *see also Jeffers*, 267 F.3d at 913 (deliberate indifference standard applies where there is no
 24 "ongoing prison security measure"); *Johnson v. Lewis*, 217 F.3d 726, 734 (9th Cir. 2000). Moreover,
 25 there is no need for a showing of serious injury as a result of the force, but the lack of such injury is
 26 relevant to the inquiry. *See Hudson*, 503 U.S. at 7-9; *Martinez*, 323 F.3d at 1184; *Schwenk*, 204 F.3d

1 at 1196. Plaintiff states an Eighth Amendment excessive force claim against defendants.

2 Allegations of retaliation against a prisoner's First Amendment rights to speech or to
 3 petition the government may support a section 1983 claim. *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th
 4 Cir. 1985); *see also Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989). To establish a *prima
 5 facie* case, plaintiff must allege and show that defendants acted to retaliate for his exercise of a protected
 6 activity, and defendants' actions did not serve a legitimate penological purpose. *See Barnett v. Centoni*,
 7 31 F.3d 813, 816 (9th Cir. 1994); *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). A plaintiff
 8 asserting a retaliation claim must demonstrate a "but-for" causal nexus between the alleged retaliation
 9 and plaintiff's protected activity (*i.e.*, filing a legal action). *McDonald v. Hall*, 610 F.2d 16, 18 (1st Cir.
 10 1979); *see Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The prisoner must
 11 submit evidence, either direct or circumstantial, to establish a link between the exercise of constitutional
 12 rights and the allegedly retaliatory action. *Pratt*, 65 F.3d at 806. Timing of the events surrounding the
 13 alleged retaliation may constitute circumstantial evidence of retaliatory intent. *See Soranno's Gasco,
 14 Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989). Plaintiff states a retaliation claim against
 15 defendants.

16 No other claims are stated in this complaint.

17 **IV. Conclusion**

18 **IT IS THEREFORE ORDERED** that plaintiff's application to proceed *in forma
 19 pauperis* (docket #12) without having to prepay the full filing fee is **GRANTED**; plaintiff shall not be
 20 required to pay an initial installment fee. Nevertheless, the full filing fee shall still be due, pursuant to
 21 28 U.S.C. § 1915, as amended by the Prisoner Litigation Reform Act of 1996. The movant herein is
 22 permitted to maintain this action to conclusion without the necessity of prepayment of fees or costs or
 23 the giving of security therefor. This order granting *in forma pauperis* status shall not extend to the
 24 issuance of subpoenas at government expense.

25 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915, as amended by the
 26 Prisoner Litigation Reform Act of 1996, the Nevada Department of Corrections shall pay to the Clerk

1 of the United States District Court, District of Nevada, 20% of the preceding month's deposits to the
2 account of Anthony Lewis, **Inmate No. 96337** (in months that the account exceeds \$10.00) until the full
3 \$350 filing fee has been paid for this action. The Clerk shall send a copy of this order to the attention
4 of Albert G. Peralta, Chief of Inmate Services for the Nevada Department of Prisons, P.O. Box 7011,
5 Carson City, NV 89702.

6 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise
7 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by the
8 Prisoner Litigation Reform Act of 1996.

9 **IT IS THEREFORE ORDERED** that the Clerk of the Court shall **FILE** the complaint
10 (docket #1-1).

11 **IT IS FURTHER ORDERED** that plaintiff's Eighth Amendment claim **MAY**
12 **PROCEED**.

13 **IT IS FURTHER ORDERED** that plaintiff's retaliation claim **MAY PROCEED**.

14 **IT IS FURTHER ORDERED** as follows:

15 1. The Clerk shall electronically serve a copy of this order, including the attached Notice
16 of Intent to Proceed with Mediation form, along with a copy of plaintiff's complaint, on the Office
17 of the Attorney General of the State of Nevada, to the attention of Pamela Sharp.

18 2. The Attorney General's Office shall advise the Court within **twenty-one (21)** days of the date
19 of entry of this order whether it can accept service of process for the named defendants. As to any of
20 the named defendants for which the Attorney General's Office cannot accept service, the Office shall
21 file, *under seal*, the last known address(es) of those defendant(s).

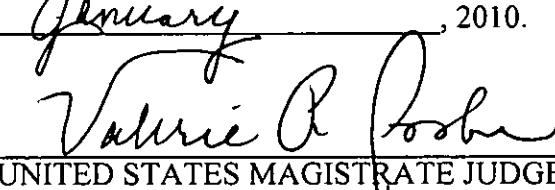
22 3. If service cannot be accepted for any of the named defendant(s), plaintiff shall file a motion
23 identifying the unserved defendant(s), requesting issuance of a summons, and specifying a full name and
24 address for said defendant(s). Plaintiff is reminded that, pursuant to Rule 4(m) of the Federal Rules of
25 Civil Procedure, service must be accomplished within one hundred twenty (120) days of the date the
26 complaint was filed.

1 4. If the Attorney General accepts service of process for any named defendant(s), such
2 defendant(s) shall file and serve an answer or other response to the complaint within **thirty (30)** days
3 following the date of the early inmate mediation. If the court declines to mediate this case, an answer
4 or other response shall be due within **thirty (30)** days following the order declining mediation.

5 5. The parties **SHALL DETACH, COMPLETE, AND FILE** the attached Notice of Intent to
6 Proceed with Mediation form on or before **thirty (30)** days from the date of entry of this order.

7 **IT IS FURTHER ORDERED** that henceforth, plaintiff shall serve upon defendants, or,
8 if an appearance has been made by counsel, upon their attorney(s), a copy of every pleading, motion, or
9 other document submitted for consideration by the court. Plaintiff shall include with the original paper
10 submitted for filing a certificate stating the date that a true and correct copy of the document was mailed
11 to the defendants or counsel for defendants. If counsel has entered a notice of appearance, the plaintiff
12 shall direct service to the individual attorney named in the notice of appearance, at the address stated
13 therein. The court may disregard any paper received by a district judge or a magistrate judge that has
14 not been filed with the Clerk, and any paper which fails to include a certificate showing proper service.

15 **IT IS FURTHER ORDERED** that plaintiff's motion for appointment of counsel (docket
16 #6) is **DENIED**.

17
18 DATED this 3rd day of January, 2010.
19
20 
21 _____
22 UNITED STATES MAGISTRATE JUDGE
23
24
25
26

1
2
3 Name _____
4

5 Prison Number _____
6

7 Address _____
8

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

9 Plaintiff, _____) Case No. _____
10 v. _____)
11 _____)
12 _____)
13 Defendants. _____)
14

**NOTICE OF INTENT TO
PROCEED WITH MEDIATION**

15 This case may be referred to the District of Nevada's early inmate mediation program. The
16 purpose of this notice is to assess the suitability of this case for mediation. Mediation is a process by
17 which the parties meet with an impartial court-appointed mediator in an effort to bring about an
18 expedient resolution that is satisfactory to all parties.

19 1. Do you wish to proceed to early mediation in this case? Yes No

20 2. If no, please state the reason(s) you do not wish to proceed with mediation? _____
21 _____
22 _____

23 3. List any and all cases, including the case number, that plaintiff has filed in federal or state court
24 in the last five years and the nature of each case. (Attach additional pages if needed).
25 _____
26 _____

4. List any and all cases, including the case number, that are currently pending or any pending grievances concerning issues or claims raised in this case. (Attach additional pages if needed).

5. Are there any other comments you would like to express to the court about whether this case is suitable for mediation. You may include a brief statement as to why you believe this case is suitable for mediation. (Attach additional pages if needed).

This form shall be filed with the Clerk of the Court on or before thirty (30) days from the date of this order.

Counsel for defendants: By signing this form you are certifying to the court that you have consulted with a representative of the Nevada Department of Corrections concerning participation in mediation.

16 Dated this _____ day of _____, 20_____.

Signature

Name of person who prepared or
helped prepare this document